Supreme Court, U. S.
FILED
SEP 1 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-321

STENCEL AERO ENGINEERING CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

THOMAS J. WHALEN
Counsel for Petitioner
Stencel Aero Engineering
1251 Avenue of the Americas
New York, New York 10020

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Question Presented 2

Statute Involved 3

Statement of the Case 4

A. The Facts 4

B. Proceedings in the Courts Below 4

Reasons for Granting the Writ 5

1. The Eighth Circuit has decided a federal question in a way that conflicts with the applicable decisions of the Court 5

2. The Eighth Circuit has decided an important federal question in a novel way that conflicts with a majority of the United States Circuit Courts of Appeals and should be reviewed by the Court 7

Conclusion 15

Affidavit of Service 16

Table of Authorities

Cases:

Barr v. *Brezina Construction Co.*, 464 F.2d 1141 (10th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1972) 8, 10

PAGE

Certain Underwriters at Lloyd's v. *United States*, 511 F.2d 159 (5th Cir. 1975) 7, 10

Drake v. *Treadwell Construction Co.*, 299 F.2d 789 (3rd Cir. 1962) 6

Feres v. *United States*, 340 U.S. 135 (1950) .....*passim*

Galimi v. *Jetco, Inc.*, 514 F.2d 949 (2nd Cir. 1975) ..8, 12, 13
General Dynamics Corporation v. *United States*, 535 F.2d 489 (9th Cir. 1976) 8, 9

Murray v. *United States*, 405 F.2d 1361 (D.C. Cir. 1968) 8, 10

Newport Air Park, Inc. v. *United States*, 419 F.2d 342 (1st Cir. 1969) 8, 12

Travelers Insurance Company v. *United States*, 493 F.2d 881 (3rd Cir. 1974) 8, 12
Treadwell Construction Co. v. *United States*, 372 U.S. 772 (1963) 6, 7, 9

United Air Lines v. *Wiener*, 335 F.2d 379 (9th Cir. 1964) *cert. denied*, 379 U.S. 951 (1964) 9
United States v. *Brown*, 348 U.S. 110 (1954) 7
United States v. *Yellow Cab Co.*, 340 U.S. 543 (1951) .. 11

Wallenius Bremen G.m.b.H. v. *United States*, 409 F.2d 994 (4th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970) 8, 12
Wellington Transportation Co. v. *United States*, 481 F.2d 108 (6th Cir. 1973) 8, 11
Weyerhaeuser S.S. Co. v. *United States*, 372 U.S. 597 (1963) 5, 6, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. .....

STENCEL AERO ENGINEERING CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Stencel Aero Engineering Corporation, third-party plaintiff and appellant in the proceedings below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Opinions Below

The opinion of the Court of Appeals is not reported, either officially or unofficially. It is printed in the Appendix to this Petition at pages 4a-23a.

The opinion of the District Court is reported at 395 F.Supp. 52 (E.D.Mo. 1975) and is printed in the Appendix to this Petition at pages 24a to 27a.

Jurisdiction

The judgment of the Court of Appeals was entered on June 4, 1976. Appendix, p. 4a. This petition is timely filed pursuant to 28 U.S.C. §§1254(1) and 2101(c).

Questions Presented

As alleged in his complaint, John C. Donham, while on duty for training with the Missouri Air National Guard was seriously injured when forced to eject from the F-100D fighter aircraft he was piloting. He brought suit against Stencel Aero Engineering Corporation ("Stencel"), the United States of America ("United States") and others in the District Court for the Eastern District of Missouri, alleging that the egress system which caused his injuries was defective. Stencel cross-claimed for indemnity against the United States alleging that the defect was the result of designs and specifications provided by the United States. Stencel claimed that it was entitled to indemnity under Missouri law, the accident having occurred in Missouri.

The United States moved for summary judgment against Donham asserting that *Feres* v. *United States*, 340 U.S. 135 (1950), barred Donham's action since he was an on-duty serviceman and the injuries were sustained "incident to his service." The United States also moved for summary judgment against Stencel claiming that its immunity from liability to Donham barred Stencel's claim for indemnity inasmuch as the United States had no underlying liability to Donham. Stencel claimed that under the Federal Tort Claims Act Missouri law governed Stencel's cross-claim against the United States and that Missouri law does not require underlying liability of the United States to Donham

in order for indemnity to lie in favor of Stencel against the United States for any damages awarded to Donham.

The District Court, Nangle, D.J., granted summary judgment in favor of the United States both as to the claim of Donham and the claim of Stencel. Stencel appealed and the United States Court of Appeals for the Eighth Circuit affirmed.

The Eighth Circuit held that it was inappropriate to apply state law to federal relationships involving the United States, its military contractors and its military employees. Therefore, the court concluded the Federal Tort Claims Act which required the application of state law in determining the liability of the United States does not apply to the facts of this case wherein indemnity is sought against the United States by a military contractor for damages suffered by an on-duty serviceman.

The question presented to the Court is:

> Whether, pursuant to the Federal Tort Claims Act, 28 U.S.C. §2674, state law should be applied to determine the validity of a cause of action for indemnity brought against the United States by a private individual who ultimately may be held liable for personal injuries suffered by a government employee caused by the negligence of the United States?

Statute Involved

The statute involved is the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671, 2674. The text of these provisions is set forth in the Appendix to this Petition at pages 1a to 3a.

Statement of the Case

A. *The Facts.*

John C. Donham alleged in his complaint that on June 9, 1973 he was injured in Missouri when he was forced to eject from the F-100D fighter aircraft he was piloting. Donham further alleged that he was on duty for training with the Missouri Air National Guard.

Donham claimed that his injuries were the direct result of an "inherent defect" in the "egress life support system" installed on the aircraft. He claimed alternatively that the "egress life support system" malfunctioned because of the "negligence and carelessness of the defendants (Stencel and the United States) individually and jointly."

In its cross-claim, Stencel alleged that the defect was the result of faulty designs and specifications provided by the United States. Therefore, Stencel alleged that any liability it might have to Donham would be the result of the negligence of the United States in its relations with Stencel.

B. *The Proceedings in the Courts Below.*

The District Court held that, pursuant to *Feres* v. *United States,* 340 U.S. 135 (1950), the Court lacked subject matter jurisdiction to entertain either Donham's or Stencel's claims against the United States.

The decision and order of the District Court was appealed to the United States Court of Appeals for the Eighth Circuit. Stencel argued that *Feres* did not bar subject matter jurisdiction in the District Court; that a majority of the United States Courts of Appeals had applied state law pursuant to the command of the Federal Tort Claims Act in similar cases; that Missouri law allowed causes of

action for indemnity on the facts of this case; and finally, that the relationship of the United States to Donham was irrelevant to the determination of Stencel's cross-claim against the United States since it was founded on the negligence of the United States in its dealings with Stencel.

Disregarding any duties of the United States to Stencel, the United States argued that federal law should apply and preclude Stencel's recovery because to do otherwise would be to allow Donham to recover indirectly against the United States what he could not recover directly.

The United States Court of Appeals for the Eighth Circuit determined that the critical question was whether the Federal Tort Claims Act covered Stencel's cross-claim. In determining this question, the Eighth Circuit found in the *Feres* case a consideration of whether use of state law would be appropriate or inappropriate. The Court then held that, since two relationships in this case—the serviceman-government relationship and that between Stencel and the United States—were federal in nature, application of state law would be inappropriate. Since the Federal Tort Claims Act commands the use of state law, the Court of Appeals held that it does not apply to Stencel's cause of action. (Appendix page 13a.)

Reasons for Granting the Writ

1. *The Eighth Circuit has decided a federal question in a way that conflicts with the applicable decisions of the Court.*

In 1963, the Court, in *Weyerhauser S.S. Co.* v. *United States,* 372 U.S. 597, held that the Federal Employees Compensation Act's (hereinafter the FECA) exclusive liability provision did not bar recoveries against the United States by third persons held liable for injuries to government

employees. The precise issue in that case was whether the exclusive liability provision abrogated a one hundred year old divided damages rule in admiralty. The Court held that the divided damages rule would prevail, allowing the shipowner to recover from the United States half of the cost of a settlement paid to a government worker despite the exclusive liability provision of the FECA.

In *Treadwell Construction Co.* v. *United States,* 372 U.S. 772 (1963), a case decided during the same term, the Court vacated and remanded a decision of the Third Circuit in light of *Weyerhaeuser. Treadwell* was a non-admiralty case in which a third party sought indemnity from the United States for damages suffered by a government employee. The clear intent of the decision in *Treadwell* was to extend the liability of the United States to the third-party for the damages of an injured United States employee. Since the decision of the Third Circuit, *Drake* v. *Treadwell Construction Co.,* 299 F.2d 789 (1962), was predicated on the inapplicability of the Federal Tort Claims Act (hereinafter the FTCA) by virtue of the exclusive remedy provisions of the FECA, the Court, in its remand, must have intended the application of state law pursuant to the FTCA.

The Eighth Circuit's opinion in this case appears to be in direct conflict with *Treadwell,* for in this case the Eighth Circuit has held that the FTCA and its application of state law does not govern a claim for indemnity by a third party for injuries to a government employee (in this case, a serviceman).

The fact that Donham is a serviceman rather than a government civil employee should make no difference. The Court's decision in *Feres* v. *United States,* 340 U.S. 135 (1950), stands for the proposition that a serviceman (or those claiming through him) may not recover in tort against the United States under the FTCA. Of the stated

rationales for the decision in *Feres,* the only rationale singled out by the Court as retaining its vitality in *United States* v. *Brown,* 348 U.S. 110 (1954) was the concern that a disruption of military discipline might result if servicemen were allowed to bring suit on the basis of negligent orders or acts committed in the course of military duty. This concern is not present when a third-party contractor is allowed to recover damages from the United States under the FTCA because of the negligence of the United States in breach of duties to that contractor occurring long before the serviceman was fortuitously injured.

There seems little doubt that Stencel's action would not be barred if it were for damages to a non-United States employee pilot. Since the concern about military discipline is not involved in this case, *Feres* is, in effect, the military counterpart to the exclusive liability provision of the FECA.

Thus, the opinion below conflicts with the Court's decisions in *Treadwell* and *Weyerhaeuser* that an absence of underlying liability of the United States to its employees does not bar a third party's action for indemnity against the United States under either the FTCA or the maritime divided damages rule.

2. *The Eighth Circuit has decided an important federal question in a novel way that conflicts with a majority of the United States Circuit Courts of Appeals and should be reviewed by the Court.*

Ten of the eleven circuits have decided cases involving actions for indemnity or contribution against the United States for damages to injured employees (military and civilian) in the last eight years. Of these, the Fifth,[1]

[1] *Certain Underwriters at Lloyd's* v. *United States,* 511 F.2d 159 (5th Cir. 1975).

Tenth,[2] District of Columbia,[3] and, most recently, the Ninth[4] Circuits have looked to state law to determine whether the United States may be held liable to a third party in indemnity where the United States has no underlying liability to the injured employee. The Sixth Circuit[5] has expressed agreement with the interpretation of the Tenth Circuit, though it applied maritime law in allowing the claim of tort indemnity against the United States despite the fact that the damages were to an on-duty serviceman. The Fourth Circuit[6] has allowed indemnity against the United States, despite the exclusive liability provisions of the FECA, for injuries to a government employee.

The First,[7] Second,[8] and Third[9] Circuits have adopted a "federal rule" of tort contribution and indemnity in cases involving the FECA exclusive liability clause. The Eighth Circuit in this case appears to have adopted, by use of its appropriateness test, a similar rule where two or more federal relationships are involved.

---

[2] *Barr* v. *Brezina Construction Co.*, 464 F.2d 1141 (10th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1972).

[3] *Murray* v. *United States*, 405 F.2d 1361 (D.C. Cir. 1968).

[4] *General Dynamics Corporation* v. *United States*, 535 F.2d 489 (9th Cir. 1976).

[5] *Wellington Transportation Co.* v. *United States*, 481 F.2d 108 (6th Cir. 1973).

[6] *Wallenius Bremen G.m.b.H.* v. *United States*, 409 F.2d 994 (4th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970).

[7] *Newport Air Park, Inc.* v. *United States*, 419 F.2d 342 (1st Cir. 1969).

[8] *Galimi* v. *Jetco, Inc.*, 514 F.2d 949 (2nd Cir. 1975).

[9] *Travelers Insurance Company* v. *United States*, 493 F.2d 881 (3rd Cir. 1974).

A. The decision of the Eighth Circuit directly conflicts with the decisions of the Fifth, Ninth, Tenth, and D.C. Circuit Courts of Appeal.

The first Court of Appeals following *Treadwell* to deal with the issue was the Ninth Circuit in *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379 (1964), *cert. denied*, 379 U.S. 951 (1964). That case arose out of a mid-air collision between a commercial airliner and an Air Force jet and involved the deaths of nine government employees including two members of the Armed Forces. The Ninth Circuit sought to apply Nevada law on indemnity and contribution pursuant to the FTCA. However, since there was no Nevada law on point, the court canvassed the general common law throughout the United States and predicted for Nevada the adoption of the rule that there can be no indemnity in the absence of underlying liability of the would-be indemnitor to the injured party. Applying this rule to the government employee cases, the court held that the actions for indemnity could not be maintained against the United States.

This process was recently discussed in the recent Ninth Circuit case of *General Dynamics Corporation* v. *United States*, 535 F.2d 489 (1976), where the Ninth Circuit, footnote 4, noted that the *Wiener* court enunciated "the general principles governing the problem arising in Nevada in the absence of local decisions to the contrary." 535 F.2d at 490. In denying indemnity and reaffirming *Wiener*, the Ninth Circuit further noted: "We find nothing in the decisions of the courts of California where the present cases arose, at variance with these principles as approved in Wiener." 535 F.2d 489 at 490. *General Dynamics Corporation* v. *United States*, Docket No. 76-220, is presently before this Court on a Petition for a writ of certiorari.

In 1968, the District of Columbia Circuit considered the issue in *Murray* v. *United States,* 405 F.2d 1361 (D.C. Cir. 1968). In that case, owners of a building leased to the United States sought contribution and contractual indemnity from the United States for injuries to a government employee. The court adopted the local law of the District of Columbia pursuant to the FTCA. The local rule was that "there is no right of contribution . . . unless there is a joint liability of both parties to the injured party." 405 F.2d at 1364. The court concluded that the FECA removed the liability of the United States to the injured party and that, consequently, the action for contribution could not be maintained under District of Columbia law.

The Court of Appeals for the Tenth Circuit considered the issue in *Barr* v. *Brezina Construction Co.,* 464 F.2d 1141 (10th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1972). That case involved a government contractor who sought indemnity from the United States for injuries to a serviceman which Brezina, the government contractor, alleged was the result of defective designs prepared by the United States. The court affirmed the district court's application of Utah law noting that, while *Feres* bars a serviceman's direct remedy against the United States, ". . . . it does not follow that a defendant third party plaintiff who has been subjected to liability by a serviceman inherits, so to speak, the limitations which apply to the serviceman, since his is an independent remedy based on different considerations." 464 F.2d at 1143. Applying Utah law, the court found that Brezina could not sustain its burden of proof on the indemnity issue. This case is factually indistinguishable from the instant case.

In the more recent case of *Certain Underwriters at Lloyd's* v. *United States,* 511 F.2d 159 (5th Cir. 1975), the Fifth Circuit decided a contribution case on the basis of

Louisiana law. The court held that Louisiana law required that Lloyd's and the United States be jointly liable to the injured serviceman. Since *Feres* served to eradicate the United States' liability to the serviceman, under Louisiana law, Lloyd's could not maintain its action for contribution.

In these four cases, the legal theory applied by the four Circuits is both logical and simple. The actions for indemnity and contribution are brought pursuant to the Federal Tort Claims Act. *United States* v. *Yellow Cab Co.,* 340 U.S. 543 (1951). Neither the FECA exclusive liability provision nor *Feres* bar such claims at the threshold. The courts then look to the applicable state law to determine whether, under like circumstances, contribution or indemnity would lie against a private person. If, but only if, the state law (as found or predicted) requires underlying liability of the United States to the injured party as a prerequisite to indemnity or contribution, do the courts then look to FECA or *Feres* to determine that there is not underlying liability of the United States to its injured employees. Where state law does not require underlying liability, the claim for indemnity or contribution must lie against the United States.

Thus, all four cases stand in stark conflict to the Eighth Circuit's choice of a federal "appropriateness" test to determine applicability of the FTCA to claims for indemnity against the United States.

B. The decision of the Eighth Circuit is in conflict with analogous decisions of the Fourth and Sixth Circuits.

The decision of the Eighth Circuit is in conflict with the decisions of the Sixth and Fourth Circuits. In an analogous situation, the Sixth Circuit in *Wellington Transportation Co.* v. *United States,* 481 F.2d 108 (6th Cir. 1973), held

that "the *Feres* decision does not bar third party indemnity claims against the United States arising out of suits by injured servicemen." 481 F.2d at 111. Rejecting a federal common law of tort indemnity the court, instead, looked to maritime law to determine whether the alleged claim for indemnity should be upheld.

The Fourth Circuit, in *Wallenius Bremen G.m.b.H.* v. *United States,* 409 F.2d 994 (4th Cir. 1969) held that the exclusive remedy provisions of the FECA did not bar an action for indemnity against the United States under the FTCA and the Suits in Admiralty Act. In allowing the action for indemnity, the Court adopted a liberal admiralty rule which does not require joint underlying liability for actions in indemnity.

C. The decision of the Eighth Circuit is similar to the decisions of the First, Second, and Third Circuits.

Several Circuits have reached results similar to that of the Eighth Circuit. In *Newport Air Park, Inc.* v. *United States,* 419 F.2d 342 (1st Cir. 1969), *Travelers Insurance Company* v. *United States,* 493 F.2d 881 (3rd Cir. 1974), and *Galimi* v. *Jetco, Inc.,* 514 F.2d 949 (2d Cir. 1975), the courts held as a matter of federal law that the FECA exclusive liability provisions barred suits against the United States for contribution for damages payable to injured government employees.

The rationale of these cases seems to be that the FECA is a federal workmen's compensation statute. As such, these courts have held that a federal rule should be evolved barring a claim for contribution by a third party against the United States where the government has paid benefits to its injured employee. As the Second Circuit stated in *Galimi*:

> A plurality of the Courts of Appeals has concluded that a third-party claim for contribution or tort indemnity against the United States does not lie, either because of the language of the exclusive remedy provision or because of the extinguishment of the government's underlying tort liability to its employees. 514 F.2d 949 at 953.

D. The Court should review the question presented both because of its importance and the serious ramifications inherent in the novel approach taken by the Eighth Circuit.

The issue presented for decision by this Petition is one of considerable importance. The United States Courts of Appeals have been unable to resolve the question uniformly despite numerous attempts. The issue is an ultimate one involving questions of federal immunity from suit and statutory construction. The court below termed it "an important issue under the Federal Tort Claims Act." Appendix, page 5a. As the court below further stated:

> No generally accepted and satisfactory consensus exists as to the reach of the *Feres* doctrine in cases in which a private tortfeasor seeks indemnity against the Government for reimbursement of claims paid to an injured military, on-duty serviceman. Appendix, p. 21a.

The Second Circuit in *Galimi* stated:

> The issue raised by the alleged conflict between the statutory exclusive remedy provisions embodied in most workmen's compensation laws and the doctrines governing third-party suits for contribution or indemnification in personal injury actions is neither new nor limited to the federal sphere . . . It presents what

one author has called "[p]erhaps the most evenly balanced controversy in all of workmen's compensation law." 514 F.2d at 952.

The approach taken by the court below in resolving the dilemma is the most sweeping in its ramifications. The Eighth Circuit has adopted a new test for determining the applicability of the Federal Tort Claims Act which petitioner believes to be both difficult of application and replete with detrimental ramifications.

The appropriateness test as to when state law should apply in the presence of federal relationships enunciated by the Eighth Circuit is inherently difficult to apply. In contrast, the Federal Tort Claims Act is clear and absolute in its command that state law should apply. This is the choice made by Congress.

Petitioner suggests that such a drastic departure from the command of the Federal Tort Claims Act that state law is to apply should be reviewed by the Court. Such a review is particularly necessary at this time to insure a uniform application of federal statutes, since the Circuits, as above described, are in serious conflict.

Conclusion

For the foregoing reasons, it is respectfully submitted that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case, as prayed for herein.

THOMAS J. WHALEN
Counsel for Petitioner
Stencel Aero Engineering
1251 Avenue of the Americas
New York, New York 10020

Dated: New York, New York
September 1, 1976

Of counsel:

Condon & Forsyth
George N. Tompkins, Jr.
Nathaniel F. Knappen

Affidavit of Service

I, Michael J. Holland, being over the age of 18 years, an associate attorney employed by the firm of Condon & Forsyth, hereby certify that I have this 1st day of September, 1976, served three copies of the foregoing Petition for a Writ of Certiorari upon Respondent United States of America, by mailing copies thereof to its attorneys of record in sealed envelopes, with air mail postage prepaid, deposited in The United States General Post Office, located at 33rd Street and 8th Avenue, New York, New York 10001, and addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

/s/ Michael J. Holland
Michael J. Holland

Sworn to before me this
1st day of September, 1976

/s/ Lawrence Mentz
Notary Public

Lawrence Mentz
Notary Public, State of New York
No. 31-4513579
Qualified in New York County

APPENDIX

Statutes

28 USC § 1346. UNITED STATES AS DEFENDANT

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimd to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances

where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 7426 of the Internal Revenue Code of 1954.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

June 25, 1948, c. 646, 62 Stat. 933; Apr. 25, 1949, c. 92, § 2(a), 63 Stat. 62; May 24, 1949, c. 139, § 80(a), (b), 63 Stat. 101; Oct. 31, 1951, c. 655, § 50(b), 65 Stat. 727; July 30, 1954, c. 648, § 1, 68 Stat. 589; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348; Aug. 30, 1964, Pub.L. 88-519, 78 Stat. 699; Nov. 2, 1966, Pub.L. 89-719, Title II, § 202(a), 80 Stat. 1148; July 23, 1970, Pub.L. 91-350, § 1(a), 84 Stat. 449; Oct. 25, 1972, Pub.L. 92-562, § 1, 86 Stat. 1176.

28 USC § 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

"Federal agency" includes the executive departments and independent establishment of the United States, and cor-

porations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty. June 25, 1948, c. 646, 62 Stat. 982; May 24, 1949, c. 139, § 124, 63 Stat. 106.

28 USC § 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983.

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 75-1516

JOHN C. DONHAM,

Plaintiff,

v.

UNITED STATES OF AMERICA,
STENCEL AERO ENGINEERING CORP., and
MILLS MANUFACTURING CORP.,

Defendants.

STENCEL AERO ENGINEERING CORP.,

Cross-Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Cross-Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

Submitted: February 11, 1976.

Filed: June 4, 1976.

Opinion of Court of Appeals

Before

GIBSON, *Chief Judge;* BRIGHT, *Circuit Judge;*
and VAN PELT, *Senior District Judge.**

BRIGHT, *Circuit Judge.*

This appeal presents an important issue under the Federal Tort Claims Act (FTCA) whether the United States which is immune to liability for its negligent conduct producing injury and damages to an on-duty serviceman may, nevertheless, be obligated indirectly to pay the amount of such damages through a claim for tort indemnity asserted by a third party who becomes liable for tort damages to that serviceman. We answer that issue in the negative.

Captain John C. Donham, an Air Force Reserve pilot assigned for training to the Missouri Air National Guard, while flying over Eastern Missouri, ejected from his military aircraft under emergency conditions. As a result of the malfunctioning of his aircraft's "egress life support system," he claims to have sustained serious and permanent injuries. This incident gives rise to the present appeal. Stencel Aero Engineering Corporation (Stencel) manufactured this sytem [sic]. Donham brought an action to recover for his bodily injuries, and he named as defendants, Stencel, the United States, and Mills Manufacturing Corporation. Stencel answered the complaint denying any liability and instituted a cross-claim against the United States for total indemnity.

---

* ROBERT VAN PELT, Senior District Judge, District of Nebraska, sitting by designation.

The United States moved for judgment on the pleadings against both Captain Donham and Stencel. In response to this motion, the district court dismissed Captain Donham's action against the United States on grounds of sovereign immunity, relying upon *Feres* v. *United States,* 340 U.S. 135 (1950), and *United States* v. *Demco,* 385 U.S. 149 (1966). Relying on these same cases, the district court also dismissed Stencel's cross-claim for indemnity. The court certified its disposition of Stencel's cross-claim as a final appealable judgment under Rule 54(b), Fed. R. Civ. P., and Stencel now appeals that judgment.[1]

Although the doctrine of *Feres* v. *United States, supra,* precludes Captain Donham from proceeding directly against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §2674, that doctrine, according to Stencel's contention, does not preclude Stencel as a non-military third party from obtaining restitution by way of indemnity against the United States for any damages which it might be compelled to pay to Donham. Stencel alleges that it manufactured and constructed the ejection system according to specifications and requirements provided by the United States and, in part, using components supplied by the United States.[2] After manufacture, Stencel

[1] Neither the plaintiff, Captain Donham, nor a third defendant, Mills Manufacturing Corporation, is a party to this appeal. We are concerned here only with the rights, if any, of Stencel to seek indemnity against the United States for the claim made against it by the serviceman. Since judgment was granted prior to any discovery, we are concerned only with the facts as pleaded.

[2] The Government's brief cites several cases which suggest that these allegations, if true, may constitute a defense by Stencel to Captain Donham's complaint. *See, e.g., Littlehale* v. *E.I. du Pont de Nemours & Co.,* 268 F. Supp. 791, 804 (S.D.N.Y. 1966), *aff'd,* 380 F.2d 274 (2d Cir. 1967); *Myers* v. *United States,* 323 F.2d 580 (9th Cir. 1963); *Merritt, Chapman & Scott Corp.* v. *Guy F. Atkinson Co.,* 295 F.2d 14, 16 (9th Cir. 1961). This question is not before us.

alleges that the United States took custody and control of the egress system and assumed responsibility to repair and maintain the system and to warn and instruct government employees in its proper use.

Stencel alleges that these facts imposed an independent duty upon the United States to assure Stencel that the system was not defective or inherently dangerous. Stencel argues that should it suffer any liability because of the Government's breach of its duty, it should recover indemnification in full. Further, Stencel alleges that if Donham's injuries resulted from negligence, the Government's conduct constituted active negligence but Stencel's improper conduct, if any, constituted passive negligence. Stencel argues that such a disparity of fault gives rise to a right of indemnity in favor of Stencel. Stencel asserts, appropriately, that judgment on the pleadings for a dismissal can be sustained only if it is clear beyond doubt that Stencel could prove no set of facts in support of its indemnity claims, entitling it to relief. *See Conley* v.*Gibson,* 355 U.S. 41, 45-46 (1957); *Bramlet* v. *Wilson,* 495 F.2d 714, 716 (8th Cir. 1974).

Stencel relies upon the Supreme Court's statement that through the FTCA the United States has waived its immunity from tort suits in "sweeping language." *United States* v. *Yellow Cab Co.,* 340 U.S. 543, 547 (1951).[3] Generally, the United States subjects itself to suit under the FTCA to the same extent as a private individual under

[3] 28 U.S.C. §2674 (Federal Tort Claims Act), in part provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

The jurisdictional counterpart of this provision is contained in 28 U.S.C. §1346(b).

similar circumstances in accordance with the law of the state where the tort occurred. Stencel cites several Missouri cases for the proposition that indemnity relief would be available to it under state law. *Feinstein* v. *Edward Livingston & Sons, Inc.*, 457 S.W.2d 789 (Mo. 1970); *Kansas City Southern Ry. Co.* v. *Payway Feed Mills, Inc.*, 338 S.W.2d 1 (Mo. 1960); *Western Casualty & Surety Co.* v. *Shell Oil Co.*, 413 S.W.2d 550 (Mo. App. 1967). While the United States denies that Missouri law authorizes indemnity under similar circumstances, it asserts as its principal defense that federal law applies and that a claim for damages sustained by a serviceman on active duty, whether asserted directly by that serviceman or indirectly by a third party by way of indemnity, is barred by application of the doctrine of the *Feres* case.

I. *The Scope of the Federal Government's Waiver of Sovereign Immunity Is a Question of Federal Law.*

The Federal Tort Claims Act substantially changed prior law. First, it waived the Government's sovereign immunity to most tort actions and provided for suits against the United States in the federal district courts. Second, it adopted the substantive law of the state in which the tort occurred as the standard of conduct to assess the Government's liability. Since, as we have previously observed, the scope of the waiver of sovereign immunity is quite broad, federal courts have usually focused upon interpretation and application of state law in resolving claims for indemnity.[4]

[4] *See, e.g., Adams* v. *General Dynamics Corp.*, No. 74-3484 (9th Cir., Apr. 15, 1976) (California law); *Certain Underwriters at Lloyd's* v. *United States*, 511 F.2d 159 (5th Cir. 1975) (Louisiana law); *Maddux* v. *Cox*, 382 F.2d 119 (8th Cir. 1969) (Arkansas law); *United Air Lines* v. *Wiener*, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964) (Nevada law).

However, the extent of the waiver remains an important consideration. Without a waiver of sovereign immunity applying to the claim asserted, the claim against the Government must fall. Where a question arises as to the extent of the waiver of sovereign immunity under the FTCA, the issue "is a question of federal law, separate and prior to the question of • • • liability under state law." *See Galimi* v. *Jetco., Inc.*, 514 F.2d 949, 952 (2d Cir. 1975); *Travelers Insurance Co.* v. *United States*, 493 F.2d 881, 883 (3d Cir. 1974).

II. *The United States Has Not Consented Under the Federal Tort Claims Act to be Sued for Indemnity by a Government Contractor Who is Liable to a Serviceman for Injuries Occurring on Active Duty.*

Where the United States authorizes suit under the FTCA, its liability is determined by the law of the place where the act or omission occurred to the same extent as a private defendant. 28 U.S.C. §1346(b). That the Act incorporates such state standards is a matter "not without significance" in determining "whether the Act should be construed to apply • • •." *Feres* v. *United States, supra*, 340 U.S. at 142. Stencel's claim against the United States rests upon two basic relationships—first, the military relationship between Captain Donham and the United States, and second, the military-contractual relationship between the United States and Stencel. In order to justify Stencel's action against the United States, we must infer that Congress in the FTCA intended that state law apply to situations arising out of these two relationships.

Each of these relationships long has been held to be governed exclusively by federal law. In *Feres*, the Su-

preme Court reaffirmed the long-recognized rule that the "relationship between the Government and members of its armed forces is 'distinctively federal in character • • • '." 340 U.S. at 143, *quoting United States* v. *Standard Oil Co.*, 332 U.S. 301 (1947). In *Standard Oil*, the court emphasized that

> [t]o whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority. [*Id.* at 305-06.]

Likewise, it is firmly established that the rights and duties of the United States arising pursuant to its contractual obligations primarily are governed by federal common law. *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275 (1958); *see Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943). *Cf. Whelan* v. *Penn Central Co.*, 503 F.2d 886 (2d Cir. 1974).

Thus, both essential aspects of the current case have long been committed to federal law. To conclude that the general language of the FTCA makes applicable the vagaries of state law would surely be, in the language of *Feres*, to "visit the Government with novel and unprecedented liabilities." 340 U.S. at 142. Again, in the language of *Feres*, "[w]e cannot impute to Congress such a radical departure from established law in the absence of express congressional command." *Id.* at 146.

The rationale of the Court in *Feres* is, we believe, applicable to Stencel's indemnity claims. This bolsters our

conclusion that Congress did not intend to permit this type of indemnity claim under the FTCA.

In *Feres*, the Court first observed that the FTCA was not intended to create new and unusual causes of action but was simply intended to permit the application of *appropriate* state law. *Id.* at 142. The Court then noted that the Government's authority over a member of the Armed Services is without parallel among private parties.[5] In particular, the Government's right to assign a serviceman to active duty in any single state or to several states makes it unreasonable that rights and obligations between the active duty soldier and his government should turn on accidents of political geography. *Id.* at 143. These same considerations militate strongly against Stencel's indemnity claims as well. Precisely because of the Government's unique interests and powers, its contractual obligations with material suppliers are controlled by federal law. The policies behind this rule become particularly compelling when the Government is purchasing military equipment. The Government is privileged to procure, maintain, and utilize its military hardware in a manner inappropriate for private parties. The mobility of the Armed Forces is due, in large part, to military equipment such as Captain

---

[5] In commenting upon *Feres*, in a 1954 case, the Court noted the special nature of the military relationship:

> The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read that Act as excluding claims of that character. [*United States* v. *Brown*, 348 U.S. 110, 112 (1954).]

See Alexander v *United States*, 500 F.2d 1 (8th Cir. 1974).

Donham's aircraft, which can move rapidly across this country as well as overseas.

It makes little sense to say that the duty of the United States to indemnify Stencel, a North Carolina corporation, should turn upon the fortuity that an aircraft which incorporated a Stencel product happened to crash in Missouri. Thus, since Stencel's relationship to the United States lies in a military context and the claim arises out of injuries to a serviceman, the underlying rationale of the *Feres* case suggests that provisions of the FTCA should not be read to extend to such relationships. Moreover, we think it would be anomalous to insulate the United States from claims of a serviceman for recovery of tort damages for service-incurred injuries but authorize a third party in the position of Stencel to force the United States to indirectly pay those damages.

In our view, the rule adopted in *Feres* serves to bar the serviceman's claim for injuries whether asserted directly by him or asserted by one seeking restitution through a tort indemnity theory.[6] This result, though not necessarily the rationale, receives support from other decided cases.

Five courts of appeals have faced the question of a claim against the United States under the FTCA for indemnity of claims arising from injury in a military context. All

[6] Stencel has been careful to confine its contract-related claim to the assertion of a duty "*implied in law* out of the relationship between Stencel and the United States * * *." However, Stencel has cited some authority for the proposition that, in at least some government contracts which set detailed standards of performance, an agreement to indemnify is *implied in fact*. *See, e.g., J.D. Hedin Const. Co., Inc.* v. *United States*, 347 F.2d 235, 241 (Ct. Cl. 1965). Such alleged right, if cognizable as a contract right, might be asserted in the Court of Claims under the Tucker Act, 28 U.S.C. §1346(b)(2). *See Murray* v. *United States*, 405 F.2d 1361, 1366 (D.C. Cir. 1968); *cf. Travelers Insurance Co.* v. *United States*, 493 F.2d 881, 999 (3d Cir. 1974).

but one of these courts have denied indemnity and contribution.[7] However, the circuits have not adopted a consistent rationale and the language of the various opinions cannot be harmonized. Although several of these opinions have said that the *Feres* holding is not a *per se* bar to third party indemnity claims, none has considered whether the considerations underlying *Feres* require a limitation of the right under the FTCA to seek indemnity against the United States for damages paid to compensate for a serviceman's injury.

The most recent decision of which we are aware is *Adams* v. *General Dynamics Corp.*, —— F.2d ——, No. 74-3484 (9th Cir., Apr. 15, 1976). In *Adams*, the Ninth Circuit reaffirmed its prior holdings denying indemnity in *Wien Alaska Airlines, Inc.* v. *United States*, 375 F.2d 736 (9th Cir.), *cert. denied*, 389 U.S. 940 (1967), and *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379 (9th Cir.), *cert. dismissed sub nom., United Air Lines, Inc.* v. *United States*, 379 U.S. 951 (1964). In each of these cases the claims arose out of a collision between a military and a private aircraft resulting from the fault of both pilots. In *Wiener*, the negligence of the military pilot was primarily responsible for the collision. The court permitted United Air Lines to recover full indemnity against the Government for the damages paid all civilian passengers of the private aircraft. However, the court denied any restitution to

[7] A number of federal courts have discussed a somewhat analogous issue raised by the exclusive remedy provision of the Federal Employees' Compensation Act (5 U.S.C. §8116(c)) and with varying rationales have either denied or allowed third party recovery for contribution or indemnity from the United States. *See Wallenius Bremen G.m.b.H.* v. *United States*, 409 F.2d 994 (4th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970); Annot., 12 A.L.R. Fed. 616 (1972).

United Air Lines for damage awards to the civilian and military federal employees injured while flying in the military aircraft.

With respect to the civilian federal employees, the court held that neither "contribution nor indemnity may be awarded without the support of liability on the part of the indemnitor [the United States] to the person injured [the civilian government employees]." *Id.* at 403. The court held that the exclusive liability provision of the Federal Employees' Compensation Act precluded finding the necessary tort liability of the Government to the civilian employees. The court then considered the servicemen cases and ruled that

> [w]ith respect to the two servicemen cases, United's claim for indemnity must fall for the reason that the government is not liable under the Federal Tort Claims Act for injuries to servicemen where injuries arise out of or are in the course of activity incident to service. Feres v. United States, 340 U.S. 135 • • •. [*Id.* at 404.]

The other two Ninth Circuit cases involve similar facts and reach the same result. All of these decisions rested solely upon tort liabilities; no implied contractual or quasicontractual rights—attenuated or otherwise—were advanced or decided. *Cf. Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956); *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597 (1963).

In *Maddux* v. *Cox*, 382 F.2d 119 (8th Cir. 1967), a Navy vehicle collided with a private auto as the result of mutual fault. A serviceman passenger in the Navy vehicle recovered against the private driver. The private driver, in turn, sought to shift part or all of the burden to the United

States because of the negligence of the Navy driver. The court construed the claim as one for contribution and denied recovery on the merits. Although the case was technically decided under state law, the Ninth Circuit's decisions in *Wein* and *Wiener, supra,* were cited[8] for the proposition that such recovery could not be had in the absence of direct liability of the United States to the injured party. Again, no contractual relationship existed between the party seeking indemnity and the United States.

The Tenth Circuit considered a similar issue in *Barr* v. *Brezina Construction Co.*, 464 F.2d 1141 (10th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). There, two contractors had remodeled a building at Hill Air Force Base pursuant to faulty government specifications. A serviceman sustained injuries because of the faulty construction and brought suit against the contractors. The contractors settled the claim for $45,000, then sought indemnity from the United States. The district court dismissed the complaint, holding that *Feres* barred any indemnity and, alternatively, that the contractors were guilty of active negligence in knowingly constructing the building in compliance with patently defective specifications. The Government's negligence in providing the specifications was termed passive.

The Tenth Circuit ruled that the *Feres* doctrine *per se* did not preclude the action for indemnity, and stated in addition that under the Supreme Court's holdings in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Co., supra; Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co., Inc.,*

---

[8] 382 F.2d at 124. Because of these citations, *Maddux* has been read as applying to indemnity as well as contribution. *Newport Air Park, Inc.* v. *United States*, 419 F.2d 342 (1st Cir. 1969); *Murray* v. *United States*, 405 F.2d 1361 (D.C. Cir. 1968).

355 U.S. 563 (1958); and *Treadwell Construction Co.* v. *United States, supra,* "a party seeking indemnity is not barred at the threshold." 464 F.2d at 1144. However, the court went on to affirm the dismissal of the indemnity claim on the grounds that the contractor's active negligence precluded ordinary tort indemnity and that no implied warranty could be found to support a quasicontractual claim.

The court specifically declined to extend the Supreme Court's admiralty-related cases to cover the situation. The court said:

> [W]e are constrained to hold that neither the *Ryan* nor *Weyerhaeuser* nor any of the other *Ryan* progeny governs. These cases all arise in the admiralty area, and most courts have refused to apply liberally the concept of implied warranty or implied contract to indemnify in other fields. [464 F.2d at 1145 (footnote omitted).]

Appellant-Stencel emphasizes the following language from *Barr*:

> [I]t does not follow [from *Feres*] that a defendant-third-party plaintiff who has been subjected to liability by a serviceman inherits, so to speak, the limitations which apply to the serviceman, since his is an independent remedy based on different considerations. [*Id.* at 1143.]

This statement is correct as far as it goes. However, it does not proceed to an analysis of those "different considerations" in light of the *Feres* rationale. In *Barr,* the contractor's own active negligence offered a simple basis for affirming the dismissal. Here, because of the sparse

record, we have been compelled to squarely confront the reach of the FTCA in circumstances of this case in light of the underlying rationale of *Feres.*[9]

The Fifth Circuit considered the indemnity issue as related to an injured serviceman in *Certain Underwriters at Lloyd's* v. *United States,* 511 F.2d 159 (5th Cir. 1975). There a military serviceman sustained injuries at the hands of a surgeon and nurses of the United States Public Health Service. The district court had dismissed his suit against the surgeon and nurses as not sanctioned by the FTCA read in light of *Feres.* This ruling was not appealed by the serviceman. However, the serviceman also had brought a direct action against the malpractice insurer of the operating surgeon as permitted by Louisiana law. Lloyd's, the insurer, settled the case for $75,000, and sought contribution from the Government on the theory that the United States Public Health Service nurses assisted in the allegedly negligent treatment. Lloyd's contended that according to the Louisiana Civil Code, this made the nurses,

---

[9] It is interesting that the Ninth Circuit panel which decided *Adams* v. *General Dynamics Corp., supra,* included both the trial judge in *Barr* and a member of the appellate panel in that case. The *Adams* panel notes that the broad language of *Barr* is somewhat inconsistent with other Tenth Circuit precedent and suggests that the decision should be considered to rest upon the active negligence of the contractors and the passive negligence of the Government. Slip op. at 5 n.6.

That panel observed that the ambiguous holding and peculiar history of *Treadwell Construction Co.* v. *United States,* 372 U.S. 772 (1963) (*per curiam*), is of " 'little manifest significance,' " and that the Supreme Court has, in fact, " 'left the issue [of third party indemnity in nonadmiralty cases] squarely undecided.' " Slip op. at 5 n.6, *quoting* Note, *Federal Law—Contribution and Indemnity Under the Federal Employees Compensation Act,* 6 Toledo L.Rev. 272, 282 n.42 (1974). The *Treadwell* decision seems of limited significance in cases arising out of injuries to a member of the Armed Forces on active duty.

and hence the United States, liable to Lloyd's as debtors "in solido." [10]

The court determined that under Louisiana law no right to contribution existed because the United States could not be held liable to the serviceman in his own right and hence, could not be considered liable "in solido" with Lloyd's. The court considered its conclusion to be consistent with that reached by this circuit in *Maddux* v. *Cox, supra,* 511 F.2d at 163. It noted that the insurer had relied on the opinions in *Barr* v. *Brezina Construction Co., supra,* and *Wellington Transportation Co.* v. *United States,* 481 F.2d 108 (6th Cir. 1973), discussed *infra.* Although these decisions did not compel a determination favorable to the insurer, the court stated:

> We are in agreement with the expression in those opinions that *Feres* itself does not bar a third party suit against the United States for indemnity. [511 F.2d at 163.]

As in *Barr* v. *Brezina Construction Co., supra,* the court did not discuss whether the underlying rationale of *Feres* might preclude indemnity.

---

[10] LSA-Civil Code Article 2103 provides:

> When two or more debtors are liable in solido . . . [the obligation] should be divided between them. As between the solidarity debtors, each is liable only for his virile portion of the obligation. [*Certain Underwriters at Lloyd's* v. *United States,* 511 F.2d 159, 161 (1975).]

The meaning of the term "in solido," as used in the above statute, is found in Article 2091 of the Civil Code:

> There is an obligation *in solido* on the part of the debtors, when they are all obliged to the same thing, so that each may be compelled for the whole, and when the payment which is made by one of them exonerates the others toward the creditor. [511 F.2d at 161.]

In *Wellington Transportation Co.* v. *United States, supra,* the Sixth Circuit held that a third party in a posture similar to that of Stencel may obtain indemnity. *Wellington* arose under admiralty law when a Coast Guard cutter and an automobile ferry, operated by Wellington Transportation Company, collided. A member of the Coast Guard in active service was injured and brought an action against Wellington to recover for his injuries. He failed in his claim but Wellington incurred substantial expense in defending the action. Wellington thereafter brought an action against the United States for indemnity to obtain reimbursement of the attorney's fees and expenses incurred in successfully defending against the principal action.

The court rejected a contractual indemnity theory such as was recognized by the Supreme Court in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Corp., supra.* As an alternative, Wellington claimed entitlement to reimbursement under the theory of tort indemnity. The district court had denied the claim relying on *Feres.* The Sixth Circuit disagreed, reading *Feres* as "concerned only with an injured serviceman's direct remedy against the United States" and finding that "nothing in the Court's opinion suggests that the holding of that case was intended to apply to a third party's claim for indemnity against the United States." 418 F.2d at 111. The court then determined that the right to tort indemnity was properly allowable under federal maritime law. However, the court remanded for further proceedings since the record did not establish that appellant's attorney's fees had been incurred in defense of a liability based upon appellant's "passive," "constructive," "vicarious," or "insulated" fault, for which the Coast Guard was the "primary" or "active" wrongdoer. *Id.* at 112.

Obviously, *Wellington* offers support for Stencel's claim. However, its rationale conflicts with the other cases we have already discussed. The basis for potential recovery rested on simple "tort indemnity," devoid of any implied contractual or quasicontractual overtones. As our prior discussion indicates, this form of indemnity requires some form of tort liability to the injured person by the party sought to be charged as an indemnitor, and several cases, as previously discussed, hold that *Feres* precludes any such tort liability on the part of the Government. *Wellington* does not mention this circuit's decision in *Maddux* v. *Cox, supra,* the two Ninth Circuit cases cited therein, or the Fifth Circuit's opinion in *Certain Underwriters at Lloyd's* v. *United States, supra.* Although these four cases technically may have turned upon particular state law, in fact they looked to and construed the general common law followed by most states and which law also would usually apply in an admiralty setting. *Cf. Hess* v. *United States,* 361 U.S. 214 (1960). *Wellington* cannot be regarded as turning upon a contrary special rule. Thus, the rationale of the court is inconsistent with the cases we have previously discussed.

Nor does *Wellington* offer much guidance on the availability of a third-party military-related indemnity claim. The court states that the *Feres* holding is not a *per se* bar to such relief. However, it does not further discuss the issue. Perhaps the best explanation of *Wellington* is that the tort occurred on a navigable waterway under admiralty law and that the primary claim for indemnity was based upon a quasicontractual duty to indemnify which is liberally inferred in admiralty law. Such claims have been allowed by the Supreme Court in admiralty cases such as *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Co., Inc., supra,*

and its progeny, and the Supreme Court's ambiguous disposition of *Treadwell Construction Co.* v. *United States, supra, see* note 9, *supra,* was taken by the *Wellington* court to require adherence to the *Ryan* rule. Certainly this view is supported language of the *Wellington* decision. [sic]

In any event, *Wellington* offers us no persuasive analysis of the relationship of the *Feres* rationale to the scope of the Government's waiver of immunity under the FTCA. Unfortunately, this is equally true of the other circuit court opinions we have discussed, including our own in *Maddux* v. *Cox, supra.* No generally accepted and satisfactory consensus exists as to the reach of the *Feres* doctrine in cases in which a private tortfeasor seeks indemnity against the Government for reimbursement of claims paid to an injured military, on-duty serviceman.

While we agree that the *Feres* opinion itself was not intended to decide the rights of third parties seeking indemnity, we think that the Court's emphasis on the unique nature of the military relationship is crucial to the instant case. We cannot agree with Stencel that the general language of the FTCA was intended to subject the conduct of the United States in equipping, training, and utilizing the Armed Forces to the varying standards of conduct and concommitant obligations and liabilities imposed by the states upon private citizens. The involvement of the military relationship in this case distinguishes this case from those involving workmen's compensation acts such as the Longshoreman's Act considered in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Co.,* 315 U.S. 124 (1956), and its progeny, and the Federal Employees' Compensation

Act considered in *Weyerhaeuser, supra,*[11] and in *Wallenius Bremen* v. *United States,* 409 F.2d 994 (4th Cir. 1969).

To allow Stencel to recover in this case would require us to "visit the Government with novel and unprecedented liabilities." *Feres* v. *United States, supra,* 340 U.S. at 142. The FTCA neither permits nor compels us to effect such a "radical departure" from the established rule of law that federal military and contractual relationships are not to

[11] In *Weyerhaeuser S.S. Co.* v. *United States, supra,* the federal civilian employee's injuries occurred as the result of a collision between a private vessel and an Army dredge. Both vessels were at fault. The federal employee recovered against the private vessel which then successfully sought partial indemnity from the United States. The Court's reasoning in granting 50 percent indemnity is inapposite to the circumstances of the present case for the following reasons:

1) There is no good reason in normal circumstances for excusing a military vessel from obeying nationwide (and, to a large extent, worldwide) uniform maritime "rules of the road" when operating in navigable waters.

2) The action appeared to be directly authorized by the Public Vessels Act, 43 Stat. 112, 46 U.S.C. §781 *et seq.*, which " 'was intended to impose on the United States the same liability • • • as is imposed by admiralty law on the private shipowner • • •.' " 372 U.S. at 600.

3) The Government's liability for half the damages was based upon "a rule of admiralty law which, for more than 100 years, has governed with • • • clarity the correlative rights and duties of two shipowners whose vessels [were] both at fault." *Id.* at 603. This rule was well known to Congress when the Public Vessels Act was adopted.

4) The Federal Employees' Compensation Act expressly provided for recapture by the United States of FECA benefits paid to the employee, thus avoiding any possibility of a double recovery. *Id.* at 598 n.2.

We note that the Supreme Court has now modified admiralty's rigid equal division of damages rule, continuing the strong current trend toward apportionment of damages according to the relative fault of the parties. *See United States* v. *Reliable Transfer Co.,* 421 U.S. 397, 406-07 (1975). However, this does not affect our analysis of the indemnity aspect of *Weyerhaeuser.*

be governed by state law.[12] Therefore, the order of the district court dismissing Stencel's cross-claim is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

[12] Stencel emphasizes the unfairness of requiring it to risk bearing the entire burden of liability for injuries for which it may have been partially, secondarily, or passively responsible. It observes that indemnity and contribution are equitable remedies evolved by the courts to ameliorate this injustice, either by distributing the loss equally through contribution or by shifting the entire burden onto the party primarily responsible through indemnity. *See* Prosser, *Law of Torts,* 3d Ed. §278. There is some force to this argument.

In *Feres,* the Supreme Court reasoned that the simple, certain, and uniform system of military compensation to injured servicemen was intended to stand in lieu of governmental tort liability in cases where the Government might be considered at fault. We note that the District of Columbia Circuit has adopted a novel approach in response to a similar "unfairness" argument in an action for contribution. That court held that the position of a beneficiary of such a compensation scheme is analogous to that of a plaintiff who has allowed one joint tortfeasor to have "bought his peace," and that the remaining defendant is entitled to have the damages reduced by half. *Murray* v. *United States,* 405 F.2d 1361, 1365 (D.C. Cir. 1968); *Martello* v. *Hawley,* 300 F.2d 721 (D.C. Cir. 1962); *see Dawson* v. *Contractors Corp.,* 467 F.2d 727 (D.C. Cir. 1972); *cf. United States* v. *Brown,* 348 U.S. 110, 111 n.1 (1954).

Opinion of District Court

JOHN C. DONHAM,

Plaintiff,

v.

UNITED STATES, et al.,

Defendants.

No. 74-711C(4).

United States District Court,

E. D. Missouri, E. D.

May 15, 1975.

Air national guard pilot brought diversity action under Federal Tort Claims Act against the United States and two private corporations for injuries sustained when he was forced to eject from his jet aircraft in flight while on duty. One corporation filed cross claim against the United States for indemnity. On the United States' motion for summary judgment, the District Court, Nangle, J., held that the claims were barred by sovereign immunity.

Motion sustained.

Action by air national guard pilot against United States under Federal Tort Claims Act, alleging that defect in aircraft egress life support system caused injuries sustained when he was forced to eject from jet aircraft in flight while on duty, was barred by sovereign immunity, and cross claim against United States by manufacturer of life support system, who was also party-defendant, was likewise barred by sovereign immunity, 10 U.S.C.A. §§ 8062, 8077, 8499; 32 U.S.C.A. §§ 104, 106, 110, 502.

Opinion of District Court

Correnti & Mykins, Robert E. Buechler, St. Louis, Mo., for plaintiff.

William A. Richter and Arthur L. Smith, Peper Martin, Jensen, Maichel & Hetlage, St. Louis, Mo. and Condon & Forsyth, New York City, for Stencel Aero Engineering Corp.

George M. Fleming and Paul F. Figley, Torts Section, Civil Division, U. S. Dept. of Justice, Washington, D. C., for United States.

MEMORANDUM

NANGLE, District Judge.

This action is before the Court upon the motions of the defendant United States for summary judgment against the plaintiff John C. Donham and to dismiss the cross-claim of co-defendant Stencel Aero Engineering Corporation ("Stencel").

Plaintiff seeks substantial damages against the United States and two private corporations for injuries sustained when, as a Missouri Air National Guard pilot, he was forced to eject from his jet aircraft in flight over Missouri. He alleges that a defect in the egress life support system, precipitated by defendants' negligence, caused his injuries. The action is brought pursuant to the Federal Tort Claims Act ("Act"), 28 U.S.C. §§ 2671-2680; diversity of citizenship is alleged to exist.

The United States moves for summary judgment on the ground that plaintiff's injury was incurred incident to his military service and that recovery against the United States under the Act is precluded by the teachings of Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), and United States v. Demko, 385 U.S. 149, 87 S.Ct. 382, 17 L.Ed.2d 258 (1966). The Supreme Court in *Feres*

ruled that the United States is not liable under the Act "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service". 340 U.S. at 146, 71 S.Ct. at 159. In *Demko* the Court ruled that a federal prisoner, injured in the performance of an assigned prison task, was limited to his exclusive statutory remedy of compensation under 18 U.S.C. § 4126. He was precluded from suit under the Federal Tort Claims Act. *Feres* and *Demko* are sought to be applied alternatively by the United States.

The Court is of the opinion that plaintiff's status as a Missouri Air National Guard pilot is sufficiently related to federal military service to apply the *Feres* ruling to bar his claim against the United States. 10 U.S.C. §§ 8062, 8077 and 8499; 32 U.S.C. §§ 104, 106, 110, 502; 37 U.S.C. § 301. *See also* Layne v. United States, 295 F.2d 433 (7th Cir. 1961), cert. den., 368 U.S. 990, 82 S.Ct. 605, 7 L.Ed.2d 527 (1961). Since the *Feres* ruling is founded on the doctrine of sovereign immunity, the Court will dismiss plaintiff's claim against the United States for lack of subject matter jurisdiction.

Stencel seeks indemnification against the United States by cross-claim alleging that Stencel manufactured the life egress system according to government specifications, that after manufacture the system was in the custody of and maintained by the United States, and that if at all Stencel's alleged negligence is passive and that of the United States is active. The United States argues that, to allow Stencel to recover against the United States on indemnity is to allow recovery indirectly of what could not be recovered by the injured plaintiff directly.

The Court agrees with the United States. In Terminal R. Ass'n. of St. Louis v. United States, 182 F.2d 149 (8th

Cir. 1950), cert. den., 340 U.S. 825, 71 S.Ct. 60, 95 L.Ed. 606 (1950), the Court of Appeals ordered dismissed for lack of subject matter jurisdiction a claim for indemnity against the United States. In that case the injured plaintiff's claim against the United States under the Federal Tort Claims act was dismissed as barred by sovereign immunity. The plaintiff's claim arose prior to the effective date of the Act. The immunity of the United States to plaintiff's claim rendered the claim for indemnity an "ethical" one only. That case governs Stencel's claim for indemnity against the United States. It will be dismissed for lack of subject matter jurisdiction.